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SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES OF AMERICA, Appellant, *against* CORNELL STEAMBOAT COMPANY, Appellee.	October Term, 1924. No. 265.

BRIEF FOR THE APPELLEE

STATEMENT

1. *This appeal, in effect, is a request for a reviewal of the lower court's findings of fact.*

In this action for a recovery of a balance of charter hire due under charters of certain steam tugs, the Court of Claims summarized the Government's defense as follows:

> "The United States defends this suit upon the ground that the owner did not part with the possession, command and navigation of the tugs during the period of the charter, but that it retained possession and command, and performed the specific service for which the tugs were let. It is claimed that the charter was for service and not a demise, and consequently that the Government had the right to make the deductions for the time the tugs were not at its disposal" (27).*

* Unless otherwise stated, the references are to the pages of the record before this court.

The Court of Claims *decided the facts* adversely to the Government, finding that the Army Transport Service *did* have the sole disposal of the tugs during the periods of the respective agreements; that the owner *did* part with the possession, command, and navigation of the tugs; and that the tugs *were* demised to the Government. (*Fifth Finding of Fact*, 26; *Opinion*, 28-29).

The Government's entire brief is devoted to an argument that the lower court erred in these findings, and again contends that there was not any demise. But that contention necessarily involves a complete reviewal of the evidence on which the Court of Claims based its findings of fact.

This is in opposition to the oft-restated rule, that an appeal to this Court from the Court of Claims brings up for review *only* the questions of law involved, and does *not* reopen the case as to the facts, as the findings of fact of the Court of Claims are deemed conclusive.

It is difficult to believe that there should be any departure from that rule here, where the Government did not except to the findings of fact of the lower court, and where the Government's record on appeal *does not contain the testimony on which the lower court based its findings of fact.*

We respectfully submit that this ground, aside from any other, is sufficient to warrant a dismissal of the appeal.

2. *The nature of the claim, and the contracts on which it rests.*

In 1917 and 1918, Cornell Steamboat Company, as owner, chartered to the United States certain tugboats for varying agreed periods of time, to be used, operated, and controlled by the Army Transport Service at New York (16-25).

The Government, expressly, and in the plainest language, agreed and contracted to pay hire *continuously*, at a specified rate per day, *during the entire period* referred to in each charter; and the contracts did not contain any exceptions authorizing any deductions whatsoever (16-25).

Except for the first month (when hire was paid in full as billed under the contracts), the Government did *not* pay the continuous hire in full, but made certain deductions for varying numbers of days, hours, and even half hours (*Third Finding of Fact*, 25; Tables 33-35).

The simple question therefore arises:

> "How can the Government justify these deductions in the face of its plain agreement to pay the hire continuously, for the entire charter periods, without any deductions whatsoever?"

The answer to this question is that the deductions *cannot* be justified, because the agreements did not contain any exceptions or provisions for suspension of hire.

The charter agreements, which were contained in letters exchanged between the parties, (16-25), specified the tug involved in each agreement, and the length of the period for which the tug was being chartered; and specifically provided for an agreed rate of charter hire "for each and every day of the charter period" (16-25).

These facts appear in the letters written by Cornell Steamboat Company (*Second Finding of Fact,* 16-25), and are summarized in the opinion of the Court of Claims, at page 26, as follows:

> "All the boats hired by the Government were hired upon the same terms, and it was provided in the contract that *per diem* hire should be paid to the plaintiff *for each and every day of the charter period.*" (Italics ours.)

Schedules L. 1-L. 7, summarizing the deductions, both by the month and by the tug, were annexed to the petition in the Court of Claims, and will be found at pages 13 and 14 of the record.

Certain of the tugs involved were known as "single crew" tugs operating for only twelve hours per day, and others, known as "double crew" tugs, operated twenty-four hours per day. The rate of hire under the charters varied according to whether the tug was a "single crew" or a "double crew" tug (16-25). It will be observed that the Government had the complete use of the 12 hour tugs, just as much as it did of the 24 hour tugs.

3. *The Government's contention.*

In the lower court (Opinion, 27) and again on this appeal, the Government's entire argument has been devoted to the contention that the tugboats were not demised to the United States, under the charter agreements.

But the Government has wholly failed to show how that contention, if accepted, would relieve it from its plain contractual agreement to pay hire continuously for the entire charter periods, without deductions.

The Government's argument may be paraphrased as follows:

> "We admit the exchange of letters in which we agreed to pay hire, at a specified *per diem* rate, for each and every day of the respective charter periods, without any specified deductions whatsoever.
>
> "If those agreements demised the tugboats to us, we will pay the hire in full as agreed; but if the tugboats were not demised to us, then the plain language of our contractual agreements (which did not authorize any deductions), does not mean what it purports to mean, and we intend to make deductions in such amounts as *we* may determine."

The Government is apparently unable to cite a single authority in support of this astonishing proposition.

4. *The Court of Claims' Decision.*

As we have already stated, the lower court refused to accept the Government's evidence, and found the facts

to be contrary to the Government's contention; and, *on the facts* which it found, it ruled that the tugs had been demised to the Government.

The lower court summarized the Government's defense as follows:

> "The United States defends this suit upon the ground that the owner did not part with the possession, command and navigation of the tugs during the period of the charter, but that it retained possession and command, and performed the specific service for which the tugs were let. It is claimed that the charter was for service and not a demise, and consequently that the Government had the right to make the deductions for the time the tugs were not at its disposal" (27).

In the Fifth Finding of Fact, (26,) the court had already found as follows:

> "During the time when the tugs hereinbefore mentioned were in the service of the Government, the Army Transport Service had the *entire use* of the tugs and they were *subject at all times* to the orders and directions of the officers of the Government, and at no time during the period did the plaintiff have the use of, and did not in any way interfere with or direct the operation of the said tugs." (Italics ours.)

The lower court, in its opinion, at page 28, elaborated on that finding of fact as follows:

> "The Court finds as a fact that these tugs were subject at all times to the orders and directions of

the officers of the Government, and that the plaintiff did not interfere with or direct the operation of the tugs. The very nature of the service to be rendered was such as to require these tugs to be absolutely under the control and subject to the orders of the officers of the Army Transport Service. *The action of the parties in the execution of the contract* showed that the plaintiff surrendered the possession, command and control of the tugs to the officers of the Government; that this surrender was required and expected; and that the officers of the Army Transport Service took charge of the tugs, navigated them, controlled them, and had absolute possession of them." (Italics ours.)

These findings of fact were squarely and plainly against the Government's case.

On those findings of fact the trial court ruled that the tugs had been demised to the Government under the charters.

The appellee submits that such a conclusion of law necessarily and properly follows from the facts found by the trial court.

If this conclusion of law is sustained (as the appellee contends that it should be), then, *admittedly*, the Government's entire defense falls.

But even if it were to be held that the tugs were not demised to the Government, and that the charters were merely ordinary time charters, still, *in any event*, the

Government contracted to pay the hire continuously for the entire charter periods, and therefore cannot justify its deductions.

In other words, we wish to emphasize the point that, although the lower court disposed of the Government's defense by its conclusion that the tugs were, *on the facts,* demised to the Government, nevertheless a reversal of that ruling would not dispose of the real point in the case that the Government, by the plain language of its contracts, was obligated to pay the hire in full for the entire charter periods.

The terms of the charter agreements as to payment of hire, expressed in plain language, remain the same, and create the same obligation, whether there was any demise or not.

FIRST POINT.

THE JUDGMENT RESTS UPON FINDINGS OF FACT IN FAVOR OF CORNELL STEAMBOAT COMPANY AND AGAINST THE GOVERNMENT. THOSE FINDINGS OF FACT CANNOT NOW BE QUESTIONED BY THE GOVERNMENT.

The Court of Claims rested its decision squarely on certain definite findings as to the conditions and circumstances under which the tugs were operated during the periods of the respective charters, and upon all the evidence offered before it (which is not now before this

court), found the actual facts to be the opposite of those for which the Government was contending. This appears clearly not only from the Fifth Finding of Fact (26), but also from the following portions of the opinion of the Court.

> "The United States defends this suit upon the ground that *the owner did not part with the possession, command and navigation of the tugs* during the period of the charter, but that it retained possession and command and performed the specific service for which the tugs were let." (Italics ours. *Opinion,* 27.)

> "The Court finds as a fact that these tugs were subject at all times to the orders and directions of the officers of the Government, and that the plaintiff did not interfere with or direct the operations of the tugs. *The very nature of the service to be rendered was such as to require these tugs to be absolutely under the control and subject to the orders* of the officers of the Army Transport Service. *The action of the parties in the execution of the contract showed that the plaintiff surrendered the possession, command, and control of the tugs* to the officers of the Government; that this surrender was required and expected; and that the officers of the Army Transport Service *took charge of the tugs, navigated them, controlled them, and had absolute possession of them.*" (Italics ours. *Opinion,* 28-29).

No exception to those findings was filed by the Government.

In the recent case of *Keokuk & Hamilton Bridge Co.* vs. *United States* (1922), 260 U. S. 125, this Court said at page 126:

> "An appreciable part of the claimant's argument consists in an attempt to reopen the findings of fact and to maintain that the pier was destroyed, as giving more force to the contention that it was taken. This, of course, is vain. The Union Pacific Ry. Co. *v.* United States, 116 U. S. 154; Talbert *v.* United States, 155 U. S. 45".

In Talbert *v.* United States, (1894) 155 U. S. 45, this Court said at page 46:

> "On this appeal only questions of law can be reviewed, and none such are presented for our consideration."

In *United States* v. *Anciens Etablissements,* (1911) 224 U. S. 309, this Court said at page 329:

> "We can only act upon the record, and that shows a finding of the court upon the question of compensation, to which finding there was not objection taken nor exception reserved. The finding determines the matter, being in the nature of a special verdict of a jury. United States *v.* New York Indians, 173 U. S. 464."

In the case at bar, the opinion of the Court of Claims makes it quite clear that its findings of fact were the contrary of those asked for by the Government. It is also made particularly plain that the Court of Claims was in-

fluenced in its finding *by its review of all the testimony offered before.*

That testimony is not now before this Court, for it has not been included in the record filed by the appellant. It is, therefore, difficult to perceive how this Court can be asked to pass at all upon the correctness of the interpretation which the lower court gave to the whole evidence in the case.

The respondent therefore submits that this is peculiarly a case in which the rule referred to above should be adhered to rigorously.

On this ground, aside from any other, the appeal herein should be dismissed.

SECOND POINT.

IN VIEW OF ITS FINDINGS OF FACT, THE COURT OF CLAIMS PROPERLY RULED THAT THE CHARTERS DEMISED THE TUGS TO THE GOVERNMENT.

1. *While the appellee believes that the ruling of the lower court should be affirmed, a reversal on this question of demise would not defeat a recovery.*

The appellant's entire argument is devoted to an attempt to reverse the decision of the Court of Claims that the charters demised the tugs to the Government. The appellant's insistence on this alleged error might make it appear that the claim is considered to stand or fall

upon the determination whether the tugs were demised or were not demised.

Any such impression would be incorrect.

If the tugs were demised, then, *admittedly,* the Government cannot defend its deductions.

The appellee believes that the Court of Claims correctly ruled that the tugs were demised; *but,* in arguing for an affirmance on this point, the appellee emphasizes the further point that even if the charters were merely time charters, and did not demise the tugs, the owner would still be entitled to its recovery under the plain language of the contracts.

2. *The surrounding circumstances, as shown by all the facts, in each case, determine whether or not a charter is a demise.*

This Court said in *United States* vs. *Shea,* (1893), 152 U. S. 178, at page 189:

> "No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control."

In *Leary* v. *United States* (1871), 14 Wall. 607, this Court said, at page 610:

> "The question as to the character in which the charterer is to be treated is in all cases one of construction.

In other words, the decision in each case must depend upon all the facts and surrounding circumstances of the charters.

3. *The Findings of the Court of Claims in this case.*

The Second Finding of Fact (15-25) set forth the letters which covered the charter agreements.

The Fifth Finding of Fact (26) is as follows:

> "During the time when the tugs hereinbefore mentioned were in the service of the Government, the Army Transport Service *had the entire use* of the tugs, and they were subject *at all times* to the orders and directions of the officers of the Government, and at no time during the period did the plaintiff have the use of, and did not in any way interfere with or direct the operations of the said tugs."

The lower court, in its opinion, amplified these findings, and expressly stated that its findings were based upon all the facts and surrounding circumstances as shown by the evidence. It said, at pages 28 and 29:

> "The Court finds as a fact that these tugs were subject at all times to the orders and directions of the officers of the Government, and that the plaintiff did not interfere with or direct the operations of the tug. The very nature of the service to be rendered was such as to require these tugs to be absolutely under the control and subject to the orders of the officers of the Army Trans-

port Service. The action of the parties in the execution of the contract showed that the plaintiff surrendered the possession, command, and control of the tugs to the officers of the Government; that this surrender was required and expected; and that the officers of the Army Transport Service took charge of the tugs, navigated them, controlled them, and had absolute possession of them" (28-29).

4. *These findings support the ruling that the charters demised the tugs to the Government.*

In *The Charlotte* (W. D. N. Y., 1922), 285 Fed. 84, a case on all fours with the case at bar, this question was considered in connection with the charter of a tug, and the ruling of the District Judge was affirmed by the Circuit Court of Appeals, 299 Fed. 595. The more pertinent portions of the opinion of the District Judge are found in 285 Fed. 87:

> "In the present instance the charter states that the 'owner does hereby charter and lease', and though that description is not absolutely controlling, yet it must be given weight in the ascertainment of the intention of the parties. American Steel Barge Co. *v.* Cargo of Coal (D. C.), 107 Fed. 964. *The fact that the owners were to keep the tug in good condition and repair her when necessary, clean the boilers once in three weeks, and furnish the master and crew and pay them, does not negative the plain import of the charter* that from May 15, 1919 to some time between November 15

and December 15th, when navigation closed, *the tug would be in the possession, management, and control of the charterer. There are no reservations as to the operation of the tug.* That her captain was under the directions and control of the superintendent of public works, even though appointed by the owners, is clearly shown, not only by the charter party but by the proofs.

"It is not to be assumed that the charter was for affreightment, or merely for towage service, or for trips. In *The Bombay,* (D. C.) 38 Fed. 512, the charter party embodied a somewhat similar provision to those contained in the charter in question and the court held that the charterers had control, management and possession of the vessel. In *The India,* (C. C.) 16 Fed. 262, Judge Wallace decided that, where the charterer obtains custody and control of the ship, an ownership *pro hac vice* is created, even though the general owner appoints the master and selects the mariners." (Italics ours.)

The Circuit Court of Appeals, in affirming the District Court, said at 299 Fed. 596:

"Nothing need be added to the opinion of the court below in respect of its holding that the charter and lease of the *Charlotte* existing at the time of the alleged negligence was a demise of the vessel and made the State of New York her owner *pro hac vice.*"

In the case of *Hahlo* v. *Benedict,* (C. C. A. 2nd C. 1914) 216 Fed. 303, under the terms of a time charter of a yacht, although the owner appointed the captain, the

latter was obliged to submit to the orders and instructions of the charterer as though the charterer were in fact the owner,—just as here, the tugs of Cornell Steamboat Company during the periods of their respective charters, were, as found by the Court of Claims, absolutely and wholly subject to the orders of the officers of the Army Transport Service, and obliged to carry out those orders just as though they had come from the owner. In the *Hahlo* case, the Court said, at page 305:

> "The ninth article certainly intends to substitute the charterer for the owner, during the term of the charter; that is to say, it subjects the captain to the same direction from the charterer as he would be bound to give the owner were it not for the charter. In the face of this provision *it becomes of small consequence who originally engaged the captain,* provided the stranding resulted from his fault. * * * Mr. Justice Story, in Marcardier *v.* Insurance Co. 8 Cranch, 39, 49, 3 L. Ed. 481, puts the test in these words, 'exclusive possession, command and navigation.' The same thing is repeated in Reed *v.* United States, 11 Wall. 591, 600, 20 L. Ed. 220. In Leary *v.* United States, 14 Wall. 607, 610, 20 L. Ed. 756, the phrase is, 'entire command and possession of the vessel and the consequent control over her navigation.' This test seems to be approved in United States *v.* Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403." (Italics ours.)

In the *Del Norte* (C. C. A., 9th C., 1902), 119 Fed. 118, affirming 111 Fed. 542, the Circuit Court of Appeals said at page 122:

> "It is thus seen that by the contract of the parties the entire ship was let to the charterer, and the ship delivered to him, under the express and distinct agreement that he should have full charge of her; that all of the officers of the vessel including those that it was stipulated should be appointed by the owner, should be 'in all respects under the order and direction' of the charterer; and that all of the earnings of the vessel during the term, of whatever character, should belong to the charterer and inure to his sole benefit. These facts leave no room for doubt that not only the possession, but the entire control, of the ship and of all its officers passed by the agreement of the parties from the owner to the charterer.

In the same case, the District Judge, in 111 Fed. 545, said:

> "And the charterer is owner *pro hac vice* where the master is *subject to his orders and directions*, though appointed to his position as master by the general owner. *The India* (D. C.), 14 Fed. 476; *The Bombay* (D. C.), 38 Fed. 512. In such a case the charterer himself is responsible for the torts of the master, because, having a legal right to control, he is legally presumed to actually control the master's conduct. On the other hand, the gen-

> eral owner is not responsible, because he does not have the right to control the master in the performance of his duties." (Italics ours.)

The foregoing statement of the rule was quoted and followed in *Hills* v. *Leeds* (D. C. Me., 1907), 149 Fed. 878, 880; affirmed 158 Fed. 1020.

In *Leary* v. *United States*, (1871) 14 Wall. 607, this Court said at page 610:

> "Whether in any particular case such result follows must depend upon the terms of the charter party, considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter party let the entire vessel to the charterer with a transfer to him of its command and possession, and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated."

In the case of the *United States* v. *Shea*, (1893) 152 U. S. 178, certain boats were let to the United States under contract for indefinite periods of time, the owner furnishing certain members of the crew. This Court said at pages 189-191:

"No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command and control. Now by this contract it was stipulated that the petitioner should 'provide and furnish to' the government, whenever called upon, during a specified year 'such vessels of the descriptions hereinafter given as may be required to take the place of the vessels now performing service, etc.' and that in case of his failure so to do the government should have 'the power to hire vessels elsewhere in open market' at his 'sole expense and charge.' These are the operative words. *The contract is for vessels, and not for any use of them.* * * * There is no stipulation which in terms, or by implication, casts upon the petitioner the management or control of any vessel accepted by the government. That the time for which the vessels were to be employed might be limited by the wishes of the government does not affect the question as to whether, while so employed, they were to be under its exclusive control and management. A demise may be for a day as well as for a year, and may be terminable at the will of the lessor" (pages 189-190).

"We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control." (Italics ours; page 190.)

THIRD POINT.

WHETHER THE CHARTERS CONSTITUTED A DEMISE OR NOT, UNDER THE TERMS OF THE AGREEMENT HIRE WAS TO RUN CONTINUOUSLY OVER THE ENTIRE PERIOD OF EACH CHARTER, WITHOUT ANY DEDUCTIONS WHATSOEVER; AND THERE IS NOT ANY RULE OF LAW WHICH WOULD ENTITLE THE GOVERNMENT AS CHARTERER ARBITRARILY TO ALTER OR MODIFY THE EXPRESSED TERMS OF THE AGREEMENTS.

1. *The charters involved here belong to one of two classes of "time" charters.*

There are three classes of charter parties, in two of which the vessel is always let or hired for an agreed period of time. The three classes are:

(a). *A demise.* That form was discussed by this court in *The Barnstable,* (1900) 181 U. S. 464.

(b). *A time charter,* or ordinary hiring of the vessel, not constituting a demise. Such a charter was discussed in *Clyde Commercial S. S. Co.* v. *West India S. S. Co.* (C. C. A. 2nd C. 1909) 169 Fed. 275.

(c). *A voyage charter,* or contract of affreightment. This form was discussed in *Texas Co.* v. *Hogarth Shipping Co. Ltd.* (1920) 256 U. S. 619.

The (a) demise and (b) ordinary time charter are alike in that, *under both forms,* the vessel is let or hired

for an agreed period of time, and hire is to be paid, at a specified rate, from the beginning to the end of the charter period, unless there is some express exception providing for suspension of hire.

The principal difference between the two forms is that under a demise the ship's officers and crew become, *even in matters of navigation and care of the vessel,* the agents of the charterer, while under an ordinary time charter the officers and crew remain the agents of the owner with respect to the navigation and care of the ship.

The third class, referred to, is where a vessel is engaged to perform a specified trip, where the compensation is in the form of freight, payable in an agreed amount, irrespective of any question of time. That class of charter is obviously not involved in the case at bar.

The error in the appellant's argument lies in its failure to recognize the fact that even if the charters here did not constitute a demise (which the lower court held they did), they must still fall in the second class, as time charters; and, in either class, the contract is for the use of the vessels for an agreed period of time, with the corresponding promise to pay hire from the beginning to the end of the agreed period.

2. *The charters of the appellee's tugs were for varying periods of time.*

They were not agreements to perform certain specified work, or to steam so many hours per day, or to tow any designated vessels between any designated points.

On the contrary, they were agreements under which the owner let the tugs to the charterer *for agreed periods of time* (16-25).

The Court of Claims in the Second Finding of Fact specifically referred to the continuous period of time during which each tug was under charter to the Government (16-25). Those periods correspond with the summaries set forth in Schedules L1-L7, which were attached to the petition (13-14).

The Fifth Finding of Fact (26) expressly referred to conditions existing "*during the time* when the tugs hereinbefore mentioned were in the service of the Government."

The Court of Claims in its opinion again emphasized the fact that the tugs were let for agreed periods of time, by stating that "these tugs were hired by the Government *for different periods of time,* and the time of hire of each tug is set out in the findings of the court" (26).

It made no difference whether the period in any case were a day or a year, as the Court of Claims pointed out (28), quoting from the decision of this Court in the case of *United States* v. *Shea,* 152 U. S. 178, 190.

3. *The agreements expressly provided that hire should be paid at an agreed rate continuously during the entire charter period, without exception.*

A typical form of the language used in the exchange of letters between the parties is found in the letter writ-

ten by Cornell Steamboat Company to Captain Shelton on December 1st, 1917, covering the tugs *John T. Welch* and *Ellen M. Ronan* (17). A portion of the letter is as follows:

> "The price of the *John T. Welch* to be eighty ($80.00) dollars per twelve (12) hour day *for each and every day of the charter period.*"
>
> "The price of the *Ellen M. Ronan* to be One hundred and fifty ($150.00) Dollars per day (of twenty-four hours) *for each and every day of the charter period*" (Italics ours).

In addition to the fact that the language expressly provided for a continuous payment of hire during the entire period of each charter, *it is particularly significant that the agreements did not provide for any deductions or cessation of hire whatsoever.*

4. *Even under ordinary time charters, the law requires continuous payment of hire from beginning to end of the entire period, where the charters do not contain any exceptions.*

Hardly any rule of the maritime law has been more frequently, or more clearly stated. Any modification of that rule would revolutionize the business carried on under ordinary time charters.

In *Carver on Carriage of Goods by Sea* (6th Ed.), p. 741, the author, in discussing detentions or lost time

which may occur during the period of a time charter, says:

> "If they arise owing to defaults of the shipowner, there may be a counterclaim against him; but, in the absence of an agreement to the contrary, the time for which the freight is to be paid runs without a break from the beginning to the end of the agreed voyage or service." (Citing *Inman S. S. Co.* v. *Bischoff* (1882), 52 L. J. Q. B. 109, 6 Q. B. D. 648; 7 A. C. 6070.)

In *Scrutton on Charter Parties and Bills of Lading* (10th Ed.), 382, there is this general statement with respect to the payment of hire.

> "*In the absence of express agreement,* it is payable during the ship's detention by blockade, embargo, bad weather *or repairs,* unless the delay involved is so great as to put an end to the whole contract." (Italics ours.)

In the editors' note following the above quotation, it is explained that the continuing obligation to pay hire is frequently modified *by express provisions* in the charter party, in the form of what is commonly known as a "breakdown" clause; but the editors, at page 384, carefully revert to the general rule as follows:

> "*Except as specially provided by such a clause,* hire continues to be payable throughout the charter period. The charterer cannot rely on an excepted peril as excusing him from paying hire during the time in which, by such excepted peril, he

is unable to use the ship." (Italics ours.) (*Citing Brown* v. *Turner, etc.*, 1912 A. C. 12; *Aktieselskabet Line* v. *Turnburll*, 1907, Sess. Cas. 508; *Modern Co.* v. *Duneric S. S. Co.*, 1907, 1 K. B. 370).

In the case of *Atlantic Fruit Co.* v. *Solari* (D. C. S. D. N. Y., 1916) (238 Fed. 217, the court recognized the general rule in the following statement, at page 223:

> "It seems to be settled that the regular breakdown clause furnishes almost the only excuse for not paying hire, except the actual frustration of the enterprise."

The Court, in discussing the rule, summarized the leading cases as follows:

> "Judge Hough held in *The Santona* (C. C.) 152 Fed. 516, that a detention in quarantine for 36 hours caused no cessation of hire. The Circuit Court of Appeals of this Circuit decided in Clyde Commercial S. S. Co., Ltd. *v.* West India S. S. Co., 169 Fed. 275, 94 C. C. A. 551, Ward J., writing the opinion, that a detention of about 11 days by the Texas authorities did not relieve the charterer from the payment of hire. In Admiral Shipping Co. *v.* Weidener Hopkins & Co. (1916) L. R., 1 K. B. 429, there was a detention by the Russian government of a month, but Bailhache, J., held that this did not cause a cessation of hire. The same result was reached in the case of Scottish Navigation Co. *v.* W. A. Souter & Co. (1916) L. R. 1 K. B. 675. In F. A. Tamplin S. S. Co. *v.* Anglo-Mexican Petroleum Products Co. (1916), L. R. 1 K. B. 485, the Court of Divisional Appeal held

> that a British vessel on time charter, which was requisitioned by the government, must still pay hire, though the charterer had no use of her; and such was the decision in Modern Transportation Co. *vs.* Dunerie S. S. Co. (1916) L. R. 1 K. B. 726, though in that case the government only paid about half the charter hire agreed upon by the original parties."

In the case of *The Santona* (D. C., S. D., N. Y., 1907), 152 Fed. 516, Judge Hough, at pages 519-520, referred to the rule as follows:

> "It is specifically provided that the hire is to be paid after the vessel is 'placed at charterers' disposal', and to continue until her redelivery. Deductions of hire are specifically provided for in the usual breakdown clause and by the specific quarantine clause above quoted. It was held by a former judge of this Court, sitting as arbitrator in *The Steamship Hackney,* that, where it is specifically agreed by charter party that hire shall be suspended in certain instances, *it cannot be suspended by implication, for reasons not assigned in the contract, and in that ruling I entirely concur.* (Italics ours.)

The opinion of ex-Judge Choate in the case to which Judge Hough referred is printed in a footnote to the report of *The Santona,* 152 Fed., pages 520-524. Judge Choate said, at page 522:

> "The parties having in the charter party specified in what cases of disaster allowance shall be made of time lost to the charterer, the case must

be fairly brought within that specification, which cannot be enlarged by implication or on a theory that a case not so specified is within its reason."

In the English case of *Havelock* v. *Geddes,* 10 East. 555, 566, which was quoted by this Court with approval in its decision of the case of *United States* v. *Shea, supra,* Lord Ellenborough, refusing to allow any deductions under the charter, said:

> "From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs if they meant to make that reduction. Without such a stipulation, we think the true construction of the charter party is that whilst those repairs are going on the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments."

In the case of *Ripley* v. *Scaife,* 5 B. & C. 167, 169 Abbott, C. J. said:

> "There is in the charter party an express stipulation for the payment of freight from a certain day for six months certain, and so much longer as the vessel shall be employed by the plaintiffs. There not being any other stipulation for the case of repairs, I think that the ship was in the employ of the plaintiffs whilst those repairs were going on, and that they were liable to pay freight during that period."

Practically all of the cases referred to above involved only ordinary time charters,—i. e., no demise.

Yet, in each case, it will be seen that the court's decision turned upon the question *whether there was any express exception* in the contract, within which the cause of the lost time might fall; and in the absence of exception, hire was held to be payable continuously in spite of any delay for repairs, shortage of men, etc.

Therefore, there is not any rule of law which supports the Government's contention that if these contracts here were only time-charters, their language should not mean exactly what it says.

These contracts, even if they *did not* demise the tugs were plainly time charters, *i. e., hirings* of the vessels; and in view of their clear provisions and the general rule of law referred to, *it is impossible to see on what ground the deductions could be justified even if the ruling of the lower court on the question of demise should be modified.*

5. *The Government is unable to cite a single authority for its contention that it should not be held to the plain provisions of its contracts.*

Practically the entire brief submitted by the Government is devoted to a discussion of the question whether or not these charters constituted a demise of each tug. In the last paragraph of its argument, the Government says:

> "If the charter be declared a contract for service rather than a demise, it follows the deductions are proper, and the claim should be dismissed."

We confidently assert that no authority for that astonishing statement can be found.

The Government, following the above statement, refers to the decisions in *United States* v. *Shea,* 152 U. S. 178, and *Clyde Commercial SS. Co.* v. *West India SS. Co.* (C. C. A. 2nd C. 1909) 169 Fed. 275, 277.

Neither of those cases support the statement.

The case of the *United States* v. *Shea,* involved a demise, and therefore, is not in point.

The case of *Clyde Commercial SS. Co.* v. *West India SS. Co.* involved a time charter, and not a demise, and the whole question before the Court was whether or not certain delays or lost time fell within the specific exceptions of the charter party.

The rule expressly recognized by the Circuit Court of Appeals in the *Clyde Commercial S. S. Co.* case was that, unless the delays were due to causes specifically excepted by the charter party, the charterer, *even under a time-charter and even in the absence of a demise,* was obligated to pay hire continuously for the entire period.

FOURTH POINT.

THE RECOVERY WITH RESPECT TO THE STEAMTUG *Ira M. Hedges* WAS PROPERLY ALLOWED.

The Government in its brief repeatedly refers to the item of $8100, on account of the hire for the steamtug *Ira M. Hedges* while she was being raised from the bottom of the river and repaired. The insistent references of the Government to this item might raise the impression that it is something apart and different from the other items of the claim.

We respectfully submit that whether the charter of the *Ira M. Hedges* constituted a demise, as the Court of Claims held, or whether it was merely a time charter, the hire for the entire period is properly recoverable.

If the charter constituted a demise, then clearly the Government cannot seek to make any deduction during the period of repairs. The Government apparently does not dispute that proposition.

If the charter was merely a time charter, and not a demise, *nevertheless the hire would run continuously* in the absence of any exception or break-down clause in the charter party. We have discussed that proposition of law in the preceding point of this brief.

In the absence of a specific exception in the contract, the only excuse which the charterer could offer for the cessation of hire, *even under a time charter not consti-*

tuting a demise, would be a frustration of the adventure.

Cf. *The Frankmere* (E. D. Va., 1920), 262 Fed. 819; affirmed (C. C. A. 4th C., 1921), 278 Fed. 139; *The Claveresk* (C. C. A. 2nd C., 1920), 264 Fed. 276; *The Isle of Mull* (C. C. A. 4th C., 1921), 278 Fed. 131; Carver on Carriage of Goods by Sea (6th Ed.), p. 741.

It clearly appears from the Fourth Finding of Fact (25), that the sinking of the tug *Ira M. Hedges* did *not* amount to a frustration, for it is specifically stated as a fact that the tug was raised and "was subsequently used by the defendant".

Therefore, in the absence of a frustration, and in the absence of any exception or break-down clause in the charter party, the hire for the *Ira M. Hedges* ran continuously for the entire period of charter party, irrespective of whether or not the charter amounted to a demise.

This item, therefore, does not rest on any different proposition of law than the other items of the claim.

The record before the lower court contained a great deal of evidence as to the cause of the sinking of the *Ira M. Hedges,* and as to the conferences between the parties and their agreement with respect to the raising and repairing of the tug.

The Government, at the twelfth page of its brief, admits that the details of the evidence are not stated in the findings. *They were not stated because such state-*

ment was not necessary, in view of the decision that the charter amounted to a demise.

In the absence of any detailed statements in the findings of fact, and in the absence of the testimony which the lower court had before it, we again submit that this is peculiarly a case in which the findings and conclusions of the lower court should not be disturbed.

FIFTH POINT.

THE GOVERNMENT CANNOT NOW SUPPORT ITS POSITION BY A BELATED SUGGESTION THAT IT IS ENTITLED TO AN OFF-SET ON ACCOUNT OF ALLEGED NEGLIGENCE OF THE OWNER OF THE TUGS.

At page 22 of its brief, the Government says:

> "If the owner failed to perform his undertaking to provide a full crew or to maintain and supply the vessels so as to enable them to perform the service, it would be responsible in damages for such breach measured in this case by the charter hire for such period."

That statement necessarily raises a question whether any of the delays complained of were caused or contributed to by fault or negligence of the owner of the tugs, in breach of its contracts.

There is not any finding of fact in the record before this court of any such negligence or fault on the part of Cornell Steamboat Company, as owner of the tugs.

The question was not raised or tried or decided in the lower court, and is not now before this court.

Certainly this Court, without any finding of the lower court on the point, and without any of the evidence before it, can hardly be expected to determine whether the alleged delays to the tugs arose through any negligence on the part of Cornell Steamboat Company.

Repairs might obviously be necessitated by causes entirely apart from negligence.

Any alleged shortage of crews would not raise any presumption of negligence on the part of the owner. *The Ice King* (C. C. A. 2nd C. 1919), 261 Fed. 897.

As to the alleged delays of the tugs when taking on supplies, there is not anything in the record to indicate any negligence of the owner. On the contrary, the Third Finding of Fact, (25), expressly states that this alleged cause of delay was purely a matter *of arbitrary opinion* of the Army officer in charge.

The belated claim of alleged negligence on the part of the owner is something entirely apart from the owner's right to collect hire in full, and is a claim which has never been litigated or mentioned in this case, prior to the statement now appearing in the Government's brief.

We respectfully submit that that statement has no place in the case on appeal, and should be disregarded.

SIXTH POINT.

THE GOVERNMENT SHOULD NOT BE PERMITTED TO SUGGEST IN ITS BRIEF A STATEMENT OF FACTS NOT SUPPORTED BY THE FINDINGS OF THE COURT OF CLAIMS.

Practically one-quarter of the Government's brief is devoted to quotations from the dissenting opinion of Judge Booth. (Government's Brief, pp. 15-21.)

The Government's brief also contains various statements of fact which cannot be supported by any reference to the record before the court, except to remarks contained in the dissenting opinion.

We protest against this practice.

It is not our understanding that the remarks of the dissenting judge constitute any part of the findings of the lower court. His remarks indicate an interpretation of the evidence which is in many instances the opposite of the facts actually found by the majority of the court.

Certainly this Court, without having before it any of the evidence, is not in a position to determine whether the interpretation given to the evidence by the dissenting judge should be accepted in preference to the findings of the majority of the court.

Thus, at page 2 of the Government's brief, we find the statement that the officers and crews of the tugs "were subject to dismissal and discipline only by" the owner. The only support for this positive statement is

a remark in Judge Booth's dissenting opinion, and, if the entire evidence in the case were now before this court, it would at once appear that that interpretation of the evidence is open to very serious question.

Again, at page 3 of its brief, the Government states that it "at the time, regarded the tugs hired upon a service basis, with the owner remaining responsible for the operation, control, and navigation of the tugs, through the officers and crews, their servants." We consider that statement wholly unjustifiable in the face of the findings of the Court of Claims; and because the statement is included in the Government's brief without justification, we cannot avoid the remark in passing that that statement is flatly contradicted by the evidence in the lower court of Captain Shelton, who entered into the agreements on behalf of the Government.

Again at page 11 of its brief, the Government, referring to its deductions, says:

> "Notice thereof was given the owner. This practice clearly denies that the Government considered the agreement a demise of the vessel. To the contrary it insisted that the owner properly man and equip its tugs, as provided, and it denied the right to discipline the crews for lax attention in the handling of the tugs; * * *."

This statement is not only misleading, but it is certainly not supported by the findings of the Court of Claims.

If the Government is to be permitted to put forward interpretations of fact based on the dissenting opinion, the appellee should be allowed to point that, on the evidence presented before the lower court, there was a very serious dispute as to whether the Government had even proved the correctness of the deductions which it sought to make.

The testimony on that point was not summarized in detail by the Court of Claims, and no definite findings of fact as to it were filed, presumably because further discussion of the point was unnecessary, under the ruling that the tugs were demised to the Government.

The only evidence offered by the Government, to prove the alleged lost time, consisted of certain files of daily logs or work sheets of the respective tugs, which were kept by the tug captains solely for, and at the instructions of the Army Transport Service, without any participation or knowledge of the owner of the tugs.

Those logs, therefore, so far as the Government was concerned, constituted self-serving declarations and could not be offered in evidence as proof of the Government's claim, particularly where not proved by the men who wrote them.

The courts have repeatedly held that a ship's log book cannot be offered in evidence by those persons in whose interests it was written. *Worral* v. *Davis Coal & Coke Co.* (S. D. N. Y. 1902) 113 Fed. 549; *The Kentucky* (S. D. N. Y. 1906) 148 Fed. 500; *Cobb* v. *Mackee* (1851) 1 How. 51.

The rule is also referred to in *Wigmore on Evidence,* Vol. 3 Section 1641; and *Greenleaf on Evidence,* 15 Ed. Sec. 495. In the case of *United States* v. *Gilbert,* 1834, Fed. Cas. No. 15304, Justice Story said:

> "I have yet to learn that parties can thus create evidence for themselves by inserting facts in a log book."

In the English case of *Sociedad Feliz,* 1 W. Rob, 303, Dr. Lushington said:

> "The log book of the party suing can never be made evidence in his favor under any circumstances."

As a matter of fact, many of the logs in the files offered in evidence in the lower court by the Government were on their face incorrect, for in numerous instances the entries actually showed that the tugs had been working during periods for which deductions had been claimed.

In still more numerous instances there were not any daily logs or work sheets at all on days for which the Government was claiming deductions, and there was not any explanation as to their absence, for the tug captains were supposed to file a daily report whether their tugs worked or not.

It would be exceedingly unjust to the respondent if such questions of fact were reopened on this appeal, when this Court has not all the evidence before it.

LAST POINT.

THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE AFFIRMED, AND THIS APPEAL SHOULD BE DISMISSED.

Respectfully submitted,

ROBERT S. ERSKINE,
JOHN M. WOOLSEY,
Counsel for Appellee.

New York City, January, 1925.